Chapter 11: Common Evidentiary Issues in Child Protective Proceedings

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In this chapter. . .

This chapter discusses rules of evidence that apply specifically to child protective proceedings, such as the abrogation of privileges, the admissibility of hearsay statements by children under 10 years old, and the admissibility of evidence of maltreatment of a sibling. It also discusses generally applicable rules of evidence that are frequently at issue in child protective proceedings, such as hearsay exceptions, witness competence, expert witness testimony, and the admissibility of photographic evidence. Section 11.2 contains a table summarizing the application of the Michigan Rules of Evidence and the standards of proof for most hearings conducted during a proceeding.

11.1 Constitutional Issues

The "clear and convincing evidence standard." Because natural parents have a fundamental liberty interest protected by US Const, Am XIV, in the care, custody, and management of their children, the state must provide "fundamentally fair" procedures when it seeks to permanently terminate parental rights. *Santosky v Kramer,* 455 US 745, 752–54 (1982). Consequently, when the state seeks to take permanent custody of a child, the state must prove parental unfitness by clear and convincing evidence. *Id.* 455 US at 769. The Court of Appeals in *Kefgen v Davidson*, 241 Mich App 611, 625 (2000), defined "clear and convincing evidence" as follows:

> "'Clear and convincing evidence is defined as evidence that 'produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.' . . . Evidence may be uncontroverted, and yet not be "clear and convincing." . . . Conversely, evidence may be "clear and convincing" despite the fact that it has been contradicted.' *In re Martin*, 450 Mich. 204, 227; 538 N.W.2d 399 (1995), quoting *In re Jobes*, 108 N.J. 394, 407-408; 529 A.2d 434 (1987); see *People v Williams*, 228 Mich. App. 546, 557-558; 580 N.W.2d 438 (1998).'"

*See Section 18.10.

Use of hearsay evidence in terminating parental rights. The requirements of due process do not prohibit admission of hearsay evidence during a termination proceeding, provided that the evidence is fair, reliable, and trustworthy. *In re Hinson,* 135 Mich App 472, 473–75 (1984), *In re Ovalle,* 140 Mich App 79, 82 (1985), and *In re Shawboose,* 175 Mich App 637, 640 (1989) (trial court did not err in admitting the findings and recommendations of a Foster Care Review Board member at hearing on termination). However, where the grounds asserted for termination of parental rights are unrelated to those for which the court took jurisdiction of the child, legally admissible evidence must be used to establish the new grounds for termination.* *In re Snyder,* 223 Mich App 85, 89–91 (1997) (new allegations of sexual abuse admitted at termination hearing, while court took jurisdiction due to neglect).

Application of the exclusionary rule. The exclusionary rule prohibits use of evidence in criminal proceedings that was directly or indirectly obtained through a violation of an accused's constitutional rights. *Wong Sun v United States,* 371 US 471, 484–85 (1963), and *People v LoCicero (After Remand),* 453 Mich 496, 508 (1996). The exclusionary rule is intended to deter violations of constitutional guarantees by removing the incentive to disregard those guarantees. "[D]espite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally

seized evidence in all proceedings or against all persons." *Brown v Illinois,* 422 US 590, 599-600 (1975), quoting *United States v Calandra,* 414 US 338, 348 (1974). The rule has been deemed inapplicable to civil child protection proceedings. *State ex rel AR v CR,* 982 P2d 73, 76 (Utah 1999). In addition, where no government official is involved in an illegal search or seizure, the objects seized may be admitted at a criminal trial. *Burdeau v McDowell,* 256 US 465, 475 (1921). However, if a search has been ordered or requested by a government official or the search and seizure is a joint endeavor of the private individual and the government official, the exclusionary rule may apply. *Corngold v United States,* 367 F2d 1, 5-6 (CA 9, 1966), and *United States v Ogden,* 485 F2d 536, 538-39 (CA 9, 1973).

Privilege against self-incrimination.* Both the state and federal constitutions prohibit compelled self-incrimination in a criminal case. US Const, Am V (no person "shall be compelled in any criminal case to be a witness against himself"), and Const 1963, art 1, §17 ("[n]o person shall be compelled in any criminal case to be a witness against himself"). Despite its reference to criminal proceedings, US Const, Am V, "not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also 'privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.'" *People v Wyngaard,* 462 Mich 659, 671–72 (2000), quoting *Minnesota v Murphy,* 465 US 420, 426 (1984).

*See also Sections 8.8 (privilege against self-incrimination does not allow a parent to refuse to undergo a psychological examination) and 16.8 (privilege does not allow parent to refuse to produce a child subject to a court order).

However, the application of the privilege against self-incrimination to civil proceedings does not allow a witness in a civil suit to refuse to testify at all. A statute, MCL 600.2154, sets forth this limitation on the application of the privilege against self-incrimination:

> "Any competent witness in a cause shall not be excused from answering a question relevant to the matter in issue, on the ground merely that the answer to such question may establish, or tend to establish, that such witness owes a debt, or is otherwise subject to a civil suit; but this provision shall not be construed to require a witness to give any answer which will have a tendency to accuse himself of any crime or misdemeanor, or to expose him to any penalty or forfeiture, nor in any respect to vary or alter any other rule respecting the examination of witnesses."

A witness in a civil suit must take the stand when called as a witness and may not invoke the privilege "'until testimony sought to be elicited will in fact tend to incriminate.'" *People v Ferency,* 133 Mich App 526, 533–34 (1984), quoting *Brown v United States,* 356 US 148, 155 (1958). The trial judge must determine whether the witness's answer may have a tendency to incriminate him or her before ordering the witness to respond. *Ferency,*

supra, at 534. This inquiry should be conducted outside a jury's presence. *In re Stricklin,* 148 Mich App 659, 666 (1986).

The Fifth Amendment to the United States Constitution does not forbid the drawing of adverse inferences against parties to civil suits who refuse to testify. See *Baxter v Palmigiano,* 425 US 308, 318 (1976) (unlike in a criminal trial, plaintiff's attorney may comment on the defendant's refusal to respond to a question.

To protect a person's privilege against self-incrimination, courts may stay civil proceedings pending the outcome of criminal proceedings. A court has inherent authority to stay a proceeding pending the outcome of a separate action even though the parties to both proceedings are not the same. *Landis v North American Co,* 299 US 248, 254–55 (1936).

In *Stricklin, supra* at 663–66, the Court of Appeals reviewed the trial court's refusal to adjourn a child protective proceeding during the pendency of concurrent criminal proceedings based on the same alleged conduct and found no violation of the parents' privilege against compelled self-incrimination under US Const, Am V, and Const 1963, art 1, §17. The parents did not testify during the civil proceeding and were eventually convicted following a criminal proceeding. The issue was "whether a penalty was exacted" for their refusal to testify "sufficient to amount to the kind of compulsion contemplated by the Fifth Amendment." *Id.* at 664. The Court of Appeals held that the purported penalty—the increased risk of loss of parental rights by refusing to testify during the protective proceeding—did not amount to compulsion prohibited by the state and federal constitutions. The parents' asserted increased risk of loss of their parental rights implied that they would present nonincriminating testimony during the civil proceedings, making their choice not to give nonincriminating testimony a matter of trial strategy, not a matter of protecting their constitutional rights. *Id.* at 665.

11.2 Table Summarizing Application of the Rules of Evidence and Standards of Proof

MCR 3.901(A)(3) states in part:

> "The Michigan Rules of Evidence, except with regard to privileges, do not apply to proceedings under this subchapter, except where a rule in this subchapter specifically so provides."

See also MRE 1101(b)(7) (the Michigan Rules of Evidence, other than those with respect to privileges, do not apply wherever a rule in Subchapter 3.900 states that they don't apply). For most hearings, the applicability of the

Michigan Rules of Evidence is explained in the following table, along with the standard of proof. Privileges are discussed in Section 11.3, below.

Stage of Proceeding	Application of Rules of Evidence	Standard of Proof	Authorities and Cross-References
Order to Take Child Into Protective Custody	The rules of evidence don't apply.	Reasonable grounds to believe that the conditions or surroundings in which a child is found endanger the child's health, safety, or welfare, and remaining in his or her home would be contrary to the child's welfare.	MCR 3.963(B)(1). **See Section 3.2**
Emergency Removal of Indian Child	The rules of evidence don't apply.	If the child resides or is domiciled on a reservation but is temporarily off the reservation, reasonable grounds to believe that the child must be removed to prevent imminent physical damage or harm to the child. If the child is not residing or domiciled on a reservation, reasonable grounds to believe that remaining in the home would be contrary to the child's welfare.	25 USC 1922 and MCR 3.980(B)(1)–(2). **See Section 20.8**
Preliminary Inquiries	The rules of evidence don't apply.	Probable cause that one or more allegations in the petition are true. Probable cause may be established with such information and in such manner as the court deems sufficient.	MCR 3.962(B)(3). **See Section 6.7**
Hearings to Determine Whether to Order Alleged Abuser Out of Child's Home	The rules of evidence don't apply.	Probable cause to believe that the person ordered to leave the home committed the alleged abuse, and that person's presence in the home presents a substantial risk of harm to the child's life, physical health, or mental well-being.	MCL 712A.13a(4)(a)–(c). **See Section 7.13**

Stage of Proceeding	Application of Rules of Evidence	Standard of Proof	Authorities and Cross-References
Preliminary Hearings	The rules of evidence don't apply.	Probable cause that one or more allegations in the petition are true and fall within §2(b) of the Juvenile Code.	MCR 3.965(B)(11) and MCL 712A.13a(2). **See Section 7.11**
	Findings regarding placement of a child may be on the basis of hearsay evidence that possesses adequate indicia of trustworthiness.	Probable cause that leaving the child in his or her home is contrary to the child's welfare.	MCR 3.965(C)(2)–(3). **See Sections 8.1(B) and 8.9**
Review of Child's Placement	The rules of evidence don't apply.	Best interests of the child.	MCR 3.966(A)–(C). **See Sections 8.11–8.16**
Removal Hearing—Indian Child	The rules of evidence don't apply.	Clear and convincing evidence, including testimony by at least one qualified expert witness, that active efforts designed to prevent breakup of Indian family have been made, and continued custody by Indian parent or custodian is likely to result in serious emotional or physical damage to child.	25 USC 1912(d)–(e) and MCR 3.980(C)(3). **See Section 20.9**
Hearing to Identify Father	The rules of evidence don't apply.	Probable cause that an identified person is the child's legal father. Paternity must be established by a preponderance of the evidence.	MCR 3.921(C). **See Section 5.2**

Stage of Proceeding	Application of Rules of Evidence	Standard of Proof	Authorities and Cross-References
Trials	The rules of evidence for civil proceedings and the special rules for child protective proceedings apply.	Preponderance of the evidence, even where the initial petition contains a request for termination of parental rights.	MCR 3.972(C)(1). **See Section 12.4**
Initial Disposition Hearings	The rules of evidence do not apply. All relevant and material evidence may be received and relied upon to the extent of its probative value.	Preponderance of the evidence.	MCR 3.973(E). **See Section 13.5**
Review of Emergency Removal of Child Following Initial Disposition	The rules of evidence do not apply. All relevant and material evidence may be received and relied upon to the extent of its probative value.	Preponderance of the evidence.	MCR 3.973(E) and MCR 3.974(C). **See Section 16.9**
Disposition Review Hearings for Child in Foster Care	The rules of evidence do not apply. All relevant and material evidence may be received and relied upon to the extent of its probative value.	Preponderance of the evidence.	MCR 3.975(E) and MCL 712A.19(11). **See Section 16.2**

Stage of Proceeding	Application of Rules of Evidence	Standard of Proof	Authorities and Cross-References
Hearings on Supplemental Petitions Alleging Additional Abuse or Neglect	If termination of parental rights is requested, see the rules governing those proceedings. If termination of parental rights is not requested, the rules of evidence do not apply. All relevant and material evidence may be received and relied upon to the extent of its probative value.	See below. Preponderance of the evidence.	MCR 3.973(H)(1) and MCR 3.977. **See Section 13.15** MCR 3.973(H)(2), MCR 3.974, and MCR 3.975. **See Section 13.15**
Permanency Planning Hearings	The rules of evidence do not apply. All relevant and material evidence may be received and relied upon to the extent of its probative value.	Preponderance of the evidence.	MCR 3.973(D)(2) and MCL 712A.19a(7). **See Section 17.4**

Stage of Proceeding	Application of Rules of Evidence	Standard of Proof	Authorities and Cross-References
Hearings to Terminate Parental Rights at Initial Disposition	1. *Trial:* the rules of evidence for civil proceedings and the special rules for child protective proceedings apply.	1. Preponderance of the evidence.	MCR 3.977(E) and MCL 712A.19b(4)–(5). **See Section 18.9**
	2. *Factfinding phase of termination hearing:* the rules of evidence apply.	2. Clear and convincing evidence that one or more allegations in the petition are true and establish grounds for termination under §19b(3)(a)–(b), (d)–(n) of the Juvenile Code.	
	3. *Best interests phase of termination hearing:* the rules of evidence don't apply. All relevant and material evidence may be received and relied upon to the extent of its probative value.	3. Termination is mandatory unless court finds by clear and convincing evidence that it is not in the child's best interests.	

Stage of Proceeding	Application of Rules of Evidence	Standard of Proof	Authorities and Cross-References
Hearings to Terminate Parental Rights Based on Different Circum-stances	1. *Factfinding phase of termination hearing:* the rules of evidence apply. 2. *Best interests phase of termination hearing:* the rules of evidence don't apply. All relevant and material evidence may be received and relied upon to the extent of its probative value.	1. Clear and convincing evidence that one or more allegations in the supplemental petition are true and establish grounds for termination under §19b(3)(a)–(b), (c)(*ii*), (d)–(g), or (i)–(n) of the Juvenile Code. 2. Termination is mandatory unless court finds by clear and convincing evidence that it is not in the child's best interests.	MCR 3.977(F). **See Section 18.10**
Hearings to Terminate Parental Rights: Other Cases	The rules of evidence don't apply. All relevant and material evidence may be received and relied upon to the extent of its probative value.	Clear and convincing evidence that one or more allegations in the supplemental petition are true. Termination is mandatory unless court finds by clear and convincing evidence that it is not in the child's best interests.	MCR 3.977(G). **See Section 18.11**

Stage of Proceeding	Application of Rules of Evidence	Standard of Proof	Authorities and Cross-References
Hearings to Terminate Parental Rights to Indian Child	*State law requirements:* See above.	See above.	MCR 3.980(D) and *In re Elliott,* 218 Mich App 196, 209–10 (1996). **See Section 20.11**
	ICWA requirements: See above.	Beyond a reasonable doubt, including testimony of qualified expert witnesses, that continued custody by the parent will likely result in serious emotional or physical damage to the child.	MCR 3.980(D) and 25 USC 1912(f). **See Section 20.11**
Post-termination Review Hearings	The rules of evidence do not apply.	Reasonable efforts to establish permanent placement. Court may enter orders it considers necessary in the child's best interest.	MCR 3.978(C). **See Section 19.2**

11.3 Abrogation of Privileges in Child Protective Proceedings

"MCL 722.631 governs privileges in child protective proceedings." MCR 3.901(A)(3). MCL 722.631 states as follows:

> "Any legally recognized privileged communication except that between attorney and client or that made to a member of the clergy in his or her professional character in a confession or similarly confidential communication is abrogated and shall not constitute grounds for excusing a report otherwise required to be made or for excluding evidence in a civil child protective proceeding resulting from a report made pursuant to [the Child Protection Law]. This section does not relieve a member of the clergy from reporting suspected child abuse or child neglect under [MCL 722.623] if that member of the clergy receives information concerning suspected child abuse or child neglect while acting in any other capacity listed under [MCL 722.623]."*

*See Section 2.1 for further discussion of "members of the clergy."

In *In re Brock,* 442 Mich 101 (1993), the parent's neighbor, who baby-sat for the children, reported suspected abuse, and testimony of a psychologist

and a physician was admitted to show the parent's fitness for custody of a child not the subject of the proceeding. The Michigan Supreme Court held that abrogation of privileges under MCL 722.631 does not depend upon whether reporting was required or not, or whether the proffered testimony concerned the abuse or neglect that gave rise to the protective proceeding. *Brock, supra* at 117. Instead, the testimony must result from a report of abuse or neglect and be relevant to the proceeding. *Id.* at 119–20. In *Brock,* a physician and psychologist were permitted to testify concerning a parent's past history of mental illness despite the fact that a neighbor reported the suspected neglect that gave rise to the proceeding.

In addition to the abrogation of privileges under the Child Protection Law, MCR 3.973(E)(1) abrogates privileges regarding materials prepared pursuant to a *court-ordered* examination, interview, or course of treatment. That rule states in relevant part that, "as provided by MCL 722.631, no assertion of an evidentiary privilege, other than the privilege between attorney and client, shall prevent the receipt and use, at the dispositional phase, of materials prepared pursuant to a court-ordered examination, interview, or course of treatment."

11.4 Admissibility of Statement by a Child Under MCR 3.972(C)

MCR 3.972(C) states as follows:

> "(2) *Child's Statement.* Any statement made by a child under 10 years of age or an incapacitated individual under 18 years of age with a developmental disability as defined in MCL 330.1100a(20) regarding an act of child abuse, child neglect, sexual abuse, or sexual exploitation, as defined in MCL 722.622(e), (f), (r), or (s), performed with or on the child by another person may be admitted into evidence through the testimony of the person to whom the statement is made as provided in this subrule.*
>
> (a) A statement describing such conduct may be admitted regardless of whether the child is available to testify or not, and is substantive evidence of the act or omission if the court has found, in a hearing held before trial, that the circumstances surrounding the giving of the statement provide adequate indicia of trustworthiness. This statement may be received by the court in lieu of or in addition to the child's testimony.

*See Sections 11.8(B), below (definition of developmental disability) and 2.1(A)–(B) (child abuse, child neglect, sexual abuse, and sexual exploitation defined).

> (b) If the child has testified, a statement denying such conduct may be used for impeachment purposes as permitted by the rules of evidence.
>
> (c) If the child has not testified, a statement denying such conduct may be admitted to impeach a statement admitted under subrule (2)(a) if the court has found, in a hearing held before trial, that the circumstances surrounding the giving of the statement denying the conduct provide adequate indicia of trustworthiness."

Notice of intent to introduce child's statement. MCR 3.922(E) requires that a proponent of a statement under MCR 3.972(C) must give notice of intent to introduce a child's statement at trial. MCR 3.922(E) states in relevant part:

> "(E) **Notice of Intent.**
>
> "(1) Within 21 days after the parties have been given notice of the date of trial, but no later than 7 days before the trial date, the proponent must file with the court, and serve all parties, written notice of the intent to:
>
> * * *
>
> (d) admit out-of-court hearsay statements under MCR 3.972(C)(2), including the identity of the persons to whom a statement was made, the circumstances leading to the statement, and the statement to be admitted.
>
> "(2) Within 7 days after receipt or notice, but no later than 2 days before the trial date, the nonproponent parties must provide written notice to the court of an intent to offer rebuttal testimony or evidence in opposition to the request and must include the identity of the witnesses to be called.
>
> "(3) The court may shorten the time periods provided in subrule (E) if good cause is shown."

Examining the totality of the circumstances surrounding the making of the statement. The court must examine the totality of the circumstances surrounding the making of the statement to determine whether there are adequate indicia of trustworthiness. Such circumstances include the spontaneity of the statement, consistent repetition of the statement, the child's mental state, the child's use of terminology unexpected by a child of similar age, and lack of a motive to fabricate. See *Idaho v Wright,* 497 US 805 (1990) (construing a residual hearsay exception), *In re Brimer,* 191

Mich App 401, 405 (1991) (relying on *Wright* to construe former MCR 5.972(C)(2)), and *In re Brock,* 193 Mich App 652, 670–71 (1992), rev'd on other grounds 442 Mich 101 (1993).

11.5 Exceptions to the "Hearsay Rule" Commonly Relied Upon in Child Protective Proceedings

MRE 801(c) defines "hearsay" as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." A "statement" is "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." MRE 801(a). Statements which are not hearsay include admissions by party-opponents, defined in part as statements which are offered against the party and which are the party's own statements. MRE 801(d)(2)(A).

"Hearsay is not admissible except as provided by [the Michigan Rules of Evidence]." MRE 802 ("the hearsay rule").* The following are exceptions to the hearsay rule commonly relied upon in child protective proceedings.

*A child's statement may be admissible under MCR 3.972(C). See Section 11.4, above.

A. Admissions by Party Opponents Are Excluded From the "Hearsay Rule"

A party's own statement is not hearsay if it is offered against the party. MRE 801(d)(2). Thus, statements by respondents may be offered against them in child protective proceedings. A statement by a "party-opponent" need not be "against that party's interest" to be admitted, as is required for admissibility of statements under MRE 804(b)(3). See *Shields v Reddo,* 432 Mich 761, 774, n 19 (1989).

B. Present Sense Impressions

This exception may allow the admission of statements describing evidence or acts of abuse. Such statements may be made to Children's Protective Services workers by telephone.

A present sense impression is defined as "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." A present sense impression is admissible even though the declarant is available as a witness. MRE 803(1).

In *People v Hendrickson*, 459 Mich 229, 236 (1998), the Supreme Court set forth the following three conditions for admission of evidence under the present sense impression exception to the hearsay rule:

- The statement must provide an explanation or description of the perceived event.
- The declarant must personally perceive the event.
- The explanation or description must be substantially contemporaneous with the perceived event.

Four Justices held that evidence is admissible under MRE 803(1) only if there is corroborating evidence that the perceived event occurred. *Hendrickson*, *supra* at 237–38 (lead opinion of Kelly, J), and 251, n 1 (concurring and dissenting opinion of Brickley, J). These Justices found that photographic evidence of a victim's injuries satisfied this requirement. *Id*. at 239–40 (lead opinion of Kelly, J), and 251, n 1 (concurring and dissenting opinion of Brickley, J). Three concurring Justices found no requirement of corroboration. *Id*. at 240–41 (concurring opinion of Boyle, J). Justice Brickley dissented, requiring corroborating evidence of substantial contemporaneity and finding no such evidence in this case. *Id*. at 251–52 (concurring and dissenting opinion of Brickley, J).

In *People v Bowman*, 254 Mich App 142 (2002), in a murder case, the Court of Appeals found no abuse of discretion by the trial court in declining under MRE 803(1) to admit testimony that the victim was "upset" after driving from a meeting with a fellow drug dealer to the home of a friend. Although the Court of Appeals acknowledged that it is "not overly literal" in construing MRE 803(1)'s "immediately thereafter" requirement, and that a statement may qualify under this phrase even when made several minutes after the observed event, the Court found that the statement "was not made merely a few minutes after the conversation . . . but following a drive of an indeterminate length from one house to another, and then in a separate conversation with someone not present during the first conversation." *Id*. at 145. To conclude that this was a "present sense impression," the Court stated, would be to "rob the phrase of its meaning . . . ." Stating that it "will not interpret the language of this evidentiary rule in a sense so contrary to its 'fair and natural import,'" the Court found no abuse of discretion by the trial court in declining to admit such an account. *Id*. at 146.

C. Excited Utterances

The "excited utterance" exception to the hearsay rule may allow admission of a child's hearsay statements describing acts of abuse. An excited utterance is defined as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." An excited utterance is admissible even if the declarant is available as a witness. MRE 803(2).

The prerequisites to admission of evidence under the excited utterance exception to the hearsay rule were stated in *People v Kowalak (On Remand)*, 215 Mich App 554, 557 (1996), as follows:

- The statement must arise out of a startling event.
- The statement must relate to the circumstances of the startling event.
- The statement must be made before there has been time for contrivance or misrepresentation by the declarant.

A sexual assault is a startling event. See *People v Straight*, 430 Mich 418, 425 (1988) ("Few could quarrel with the conclusion that a sexual assault is a startling event"). Additionally, independent proof of the startling event is required. *People v Burton*, 433 Mich 268, 294–95 (1989). The proffered excited utterance by itself is not sufficient to establish that the startling event took place. *Id*. See also *People v Layher*, 238 Mich App 573, 583 (1999), aff'd on other grounds 464 Mich 756 (2001) (strong circumstantial evidence sufficient to establish independent proof that a sexual assault occurred).

The focus of MRE 803(2) is whether the declarant spoke while under the stress caused by the startling event. *Straight*, *supra* at 425. The justification for the rule is lack of *capacity* to fabricate, not lack of *time* to fabricate. *Id*. An excited state may last for many hours after the occurrence of a startling incident. No fixed time period universally satisfies the requirements of the rule. In *People v Smith*, 456 Mich 543, 551–53 (1998), the Supreme Court held that a sexual assault victim's statement made ten hours after the sexual assault was admissible as an excited utterance because it was made while the victim was still under the overwhelming influence of the assault. Similarly, in *Layher*, *supra* at 583-584, the Court of Appeals found that a five-year-old sexual assault victim was in a continuing state of emotional shock precipitated by the assault when she made statements during therapy one week after the alleged assault with the aid of anatomical dolls.

In the following cases, the statements were found admissible as "excited utterances":

- *People v Garland,* 152 Mich App 301, 307 (1986) (statements by seven-year-old victim of sexual abuse made one day after event were admissible where child had limited mental ability and was threatened);
- *People v Lovett,* 85 Mich App 534, 543–45 (1978) (statements by three-year-old witness to rape-murder made one week later were admissible; child stayed with grandparents during the interval between event and statements, and statements were spontaneous);
- *People v Houghteling,* 183 Mich App 805, 806–08 (1990) (statements of five-year-old made 20 hours after sexual assault in response to mother's questions were admissible);

- *People v Soles,* 143 Mich App 433, 438 (1985) (statements made five days after particularly heinous sexual assault were admissible); and

- *People v Draper,* 150 Mich App 481, 486 (1986) (statements by three-year-old made a week after sexual assault by stepfather were admissible).

In the following cases, the statements were found inadmissible as "excited utterances":

- *People v Straight,* 430 Mich 418, 423–28 (1988) (statements regarding sexual abuse made one month after event, during examination, and in response to repeated questioning were inadmissible);

- *People v Sommerville,* 100 Mich App 470, 489–90 (1980) (statements to police made 24 hours after assault were inadmissible);

- *People v Scobey,* 153 Mich App 82, 85 (1986) (statements by 13 year old two and five days after event were inadmissible); and

- *People v Lee,* 177 Mich App 382, 385–86 (1989) (statements made 17 days after event were inadmissible).

In *People v Slaton*, 135 Mich App 328, 334-335 (1984), the Court of Appeals found that the tape recording of a 911 call was admissible under MRE 803(2). The Court found that the statements of both the caller and the 911 operator were admissible because they related to a startling event and were made under the stress of that event.

D. Statements of Existing Mental, Emotional, or Physical Condition

This exception may allow admission of a respondent's or child's statements to therapists or other persons. MRE 803(3) allows admission of statements "of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will." Such statements are admissible even though the declarant is available as a witness.

The declarant's state of mind must be at issue before statements showing state of mind may be admitted under MRE 803(3). See *People v White*, 401 Mich 482, 502 (1977) (victim's statements showing his fear of the defendant were inadmissible where defendant raised an alibi defense); and *People v Lucas*, 138 Mich App 212, 220 (1984) (testimony of police officer that he

believed a defendant's alibi witnesses was inadmissible under MRE 803(3)).

In *People v Fisher*, 449 Mich 441 (1995), a murder victim made various oral and written statements about the state of her marriage to the defendant-husband, about her insistence on visiting her lover in Germany, and about her intentions on divorcing or separating from the defendant. The Michigan Supreme Court held that the victim-wife's statements not known to the defendant were admissible under MRE 803(3) to show the victim's intent, plan, or mental feeling. *Fisher*, *supra* at 450. However, those statements known to the defendant, although relevant and admissible, did not constitute hearsay because there were not used for their truth, but only to show their effect on the defendant-husband. *Id*.

In *People v Howard*, 226 Mich App 528, 554 (1997), the Court of Appeals concluded that a page from a murder victim's appointment book listing the house where she was killed next to the time that she was killed was admissible under MRE 803(3) to show the victim's intent, at the time the entry was written, to go to the house. Statements showing a victim's intent may also be admissible to show the victim's subsequent conduct when that conduct is at issue in the case. *People v Furman*, 158 Mich App 302, 315-316 (1987), citing *Mutual Life Ins Co of New York v Hillmon*, 145 US 285 (1892).

In *Furman*, *supra* at 317, the Court of Appeals held that the murder victim's statements indicating her fear, dread, or nervousness of visiting an unidentified male (allegedly the defendant) were inadmissible under MRE 803(3). The statements described the victim's memories of previous contact with the man, and the victim's state of mind was not at issue in the case because the defendant claimed that he was not the perpetrator.

E. Statements Made for Purposes of Medical Treatment or Diagnosis

MRE 803(4) provides an exception to the "hearsay rule," regardless of the declarant's availability as a witness, for statements that are:

> ". . . made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment."

The rationale for admitting statements under MRE 803(4) is: (1) the self-interested motivation to speak truthfully to treating physicians in order to receive proper medical care; and (2) the reasonable necessity of the statement to the patient's diagnosis and treatment. See *Merrow v Bofferding*,

458 Mich 617, 629–30 (1998) (declarant's statement that his wound occurred after "a fight with his girlfriend" was inadmissible under MRE 803(4) because it was not reasonably necessary for diagnosis and treatment).

This exception is frequently used in child abuse or neglect cases. Typically, a child suspected of being neglected or abused is examined by a physician and makes statements concerning injuries and their cause. Note, however, that the exception is not limited to statements made to physicians. See *People v James,* 182 Mich App 295, 297 (1990) (statements made to child sexual abuse expert); *People v Skinner,* 153 Mich App 815, 821 (1986) (statements made to child psychologist); and *In re Freiburger,* 153 Mich App 251, 255–58 (1986) (statements made to psychiatric social worker).

In *People v Meeboer (After Remand)*, 439 Mich 310, 322–23 (1992), the Supreme Court listed four prerequisites of admissibility under MRE 803(4) to establish that a hearsay statement is inherently trustworthy and necessary for obtaining adequate medical diagnosis and treatment:

- The statement was made for purposes of medical treatment or diagnosis in connection with treatment;
- The statement describes medical history, past or present symptoms, pain or sensations, or the inception or general character of the cause or external source of the injury;
- The statement is supported by the "self-interested motivation to speak the truth to treating physicians in order to receive proper medical care";* and
- The statement is reasonably necessary to the diagnosis and treatment of the patient.

*See the next subsection for a list of ten factors to assist in determining the trustworthiness of statements of patients age ten and under. See also *Meeboer*, *supra* at 324-325.

The following subsections describe pertinent areas of the law governing the application of MRE 803(4): (1) trustworthiness of statements based solely upon the declarant's age; (2) trustworthiness of statements made to psychologists; and (3) statements identifying the perpetrator.

Trustworthiness: the age of the declarant. In assessing the trustworthiness of a declarant's statements, Michigan appellate courts have drawn a distinction based upon the declarant's age. For declarants over the age of ten, a rebuttable presumption arises that they understand the need to speak truthfully to medical personnel. *People v Van Tassel (On Remand),* 197 Mich App 653, 662 (1992). For declarants ten and younger, a trial court must inquire into the declarant's understanding of the need to be truthful with medical personnel. *People v Meeboer (After Remand)*, *supra* at 326. To do this, a trial court must "consider the totality of circumstances surrounding the declaration of the out-of-court statement." *Id*. at 324. The Supreme

Court in *Meeboer* established ten factors to address when considering the totality of the circumstances:

- The age and maturity of the child;
- The manner in which the statement is elicited;
- The manner in which the statement is phrased;
- The use of terminology unexpected of a child of similar age;
- The circumstances surrounding initiation of the examination;
- The timing of the examination in relation to the assault or trial;
- The type of examination;
- The relation of the declarant to the person identified as the assailant;
- The existence of or lack of motive to fabricate; and
- The corroborative evidence relating to the truth of the child's statement. *Meeboer*, *supra* at 324–25.

Trustworthiness: statements to psychologists. Regardless of the declarant's age, statements made to psychologists may be less reliable and thus less trustworthy than statements made to medical doctors. In *People v LaLone*, 432 Mich 103 (1989), a first-degree criminal sexual conduct case, the Supreme Court overturned the trial court's decision to admit the testimony of a psychologist who treated a 14-year-old complainant. The decision was based in part on the difficulty in determining the trustworthiness of statements to a psychologist. *Id*. at 109–10 (Brickley, J). The Supreme Court revisited this question in *Meeboer (After Remand)*, *supra* at 329, reiterating the belief that statements to psychologists may be less reliable than those to physicians. However, the Court also noted that "the psychological trauma experienced by a child who is sexually abused must be recognized as an area that requires diagnosis and treatment." *Id*. Accordingly, the Court stated that its decision in *LaLone* should not preclude from evidence statements made during "psychological treatment resulting from a medical diagnosis [of physical abuse]." *Meeboer*, *supra* at 329.

Statements identifying the assailant. When a sexual assault victim seeks medical treatment for an injury, it is possible that the victim's statements may identify the assailant as the "cause or external source" of the injury. If this occurs, trial courts may be called upon to determine whether the assailant's identity is "reasonably necessary to . . . diagnosis and treatment." MRE 803(4). The following cases set forth some general principles for determining whether an assailant's identity is medically relevant.

- *People v Meeboer (After Remand)*, 439 Mich 310 (1992):

In three consolidated cases, all involving criminal sexual conduct against children aged seven and under, the Supreme Court found that statements identifying an assailant may be necessary for the declarant's diagnosis and treatment—and thus admissible under MRE 803(4)—as long as the totality of circumstances surrounding the statements indicates trustworthiness. The Court listed the following circumstances under which identification of an assailant may be necessary to obtain adequate medical care:

> "Identification of the assailant may be necessary where the child has contracted a sexually transmitted disease. It may also be reasonably necessary to the assessment by the medical health care provider of the potential for pregnancy and the potential for pregnancy problems related to genetic characteristics, as well as to the treatment and spreading of other sexually transmitted diseases . . . .
>
> "Disclosure of the assailant's identity also refers to the injury itself; it is part of the pain experienced by the victim. The identity of the assailant should be considered part of the physician's choice for diagnosis and treatment, allowing the physician to structure the examination and questions to the exact type of trauma the child recently experienced.
>
> "In addition to the medical aspect . . ., the psychological trauma experienced by a child who is sexually abused must be recognized as an area that requires diagnosis and treatment. A physician must know the identity of the assailant in order to prescribe the manner of treatment, especially where the abuser is a member of the child's household. . . . [S]exual abuse cases involve medical, physical, developmental, and psychological components, all of which require diagnosis and treatment. . . .
>
> "A physician should also be aware of whether a child will be returning to an abusive home. This information is not needed merely for 'social disposition' of the child, but rather to indicate whether the child will have the opportunity to heal once released from the hospital.
>
> "Statements by sexual assault victims to medical health care providers identifying their assailants can, therefore, be admissible under the medical treatment exception to the hearsay rule if the courts finds the statement

> sufficiently reliable to support that exception's rationale." *Meeboer*, *supra* at 328-330.

- *People v Van Tassel (On Remand)*, 197 Mich App 653, 656 (1992):

In this first-degree criminal sexual conduct case, the 13-year-old complainant identified her father as her assailant during a health interview that preceded a medical examination ordered by the probate court in a separate abuse and neglect proceeding. The Court of Appeals found that the *Meeboer* factors had no application in a criminal sexual conduct case involving a complainant over age ten. Nonetheless, the Court applied the *Meeboer* factors and concluded that the complainant's hearsay statements were trustworthy and properly admitted by the trial court. The Court also held that identification of the assailant was reasonably necessary to the complainant's medical diagnosis and treatment: "[T]reatment and removal from an abusive home environment was medically necessary for the child victim of incest." *Van Tassel (On Remand)*, *supra* at 661.

- *People v Creith,* 151 Mich App 217 (1986):

The defendant appealed from his conviction of manslaughter. The victim, who suffered from kidney failure, died after an alleged beating by the defendant. At trial, the court permitted the jury to hear the testimony of a nurse from the victim's dialysis center and another nurse from a hospital emergency room. These nurses testified that the victim had described abdominal pain resulting from being punched in the abdomen. The Court of Appeals held that the trial court properly admitted the testimony of these witnesses under MRE 803(4). The Court found that the victim's statements were made for the sole purpose of seeking medical treatment and were reasonably necessary for that purpose.

F. Records of Regularly Conducted Activity

Police reports may be admissible under this rule, or under MRE 803(8) as public records. See Section 11.5(G), below.

In child protective proceedings, this exception allows for the admissibility of Family Independence Agency (FIA) records, medical records concerning the child, and police reports.* MRE 803(6) states:

> "A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or

> circumstances of preparation indicate lack of trustworthiness. The term 'business' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit."

Under MRE 803(6), properly authenticated records may be introduced into evidence without requiring the records' custodian to appear and testify. MRE 902(11) governs the authentication of a business record by the written certification of the custodian or other qualified person:

> "Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:
>
> * * *
>
> "(11) *Certified records of regularly conducted activity*. The original or a duplicate of a record, whether domestic or foreign, of regularly conducted business activity that would be admissible under rule 803(6), if accompanied by a written declaration under oath by its custodian or other qualified person certifying that-
>
> "(A) The record was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
>
> "(B) The record was kept in the course of the regularly conducted business activity; and
>
> "(C) It was the regular practice of the business activity to make the record.
>
> "A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them."

In *People v Jobson*, 205 Mich App 708, 713 (1994), police records were admitted into evidence under MRE 803(6). For an example of a case in which a medical record was admitted into evidence under MRE 803(6), see *Merrow v Bofferding*, 458 Mich 617, 626-628 (1998), where the Michigan Supreme Court held that part of plaintiff's "History and Physical" hospital record was admissible under MRE 803(6) because it was compiled and kept by the hospital in the regular course of business.

Although it otherwise meets the foundational requirements of MRE 803(6), a business record may be excluded from evidence if the source of information or the method or circumstances of preparation indicate lack of trustworthiness. In *People v Huyser*, 221 Mich App 293 (1997), the defendant was charged with first-degree criminal sexual conduct against his former girlfriend's daughter. The prosecution retained Dr. David Hickok as an expert witness, who examined the victim and prepared a report stating his finding that the evidence was consistent with vaginal penetration. Dr. Hickok was named on the prosecution's witness list but died before trial. A subsequent examination of the victim by a different physician revealed no evidence of vaginal penetration. At trial, the defendant and prosecutor offered conflicting testimony concerning vaginal penetration. Over the defendant's objection, the trial court ruled that Dr. Hickok's report was admissible under MRE 803(6), and one of Dr. Hickok's employees read portions of the report into evidence. After being convicted of second-degree criminal sexual conduct, the defendant appealed and challenged the admission of the report into evidence. The Court of Appeals found that because Dr. Hickok had prepared the report in contemplation of the criminal trial, the report lacked the trustworthiness of a report generated exclusively for business purposes. The report's trustworthiness was also undermined by the results of the subsequent examination. The Court of Appeals reversed the defendant's conviction.

"Business records," as "records of regularly conducted activity" are often termed, must contain only the observations of the reporting person and not the hearsay statements of others, unless these statements of others contained in the record ("hearsay within hearsay") are admissible under another exception to the "hearsay rule." *In re Freiburger,* 153 Mich App 251, 259–61 (1986).

G. Public Records and Reports

MRE 803(8) contains a hearsay exception for:

> "Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, and subject to the limitations of MCL 257.624 [parallel citation omitted]."*

*MCL 257.624 prohibits the use in a court action of a report required by Chapter VI of the Motor Vehicle Code.

A police report may be admissible under this rule, since child protective proceedings are not criminal cases. The rule may also allow admission of Form FIA 3200, which is used to document a report of suspected child abuse or neglect,* or portions of the FIA *Services Manual*.

*See Section 2.6.

This hearsay exception does not allow the introduction of evaluative or investigative reports. The exception extends only to "reports of objective data observed and reported by . . . [public agency] officials." *Bradbury v Ford Motor Co*, 419 Mich 550, 554 (1984). Although opinions, conclusions, and evaluations by public officials in public reports are inadmissible under MRE 803(8), objective data observed and reported by these officials is admissible. This distinction is illustrated in *People v Shipp*, 175 Mich App 332, 339–40 (1989). In *Shipp*, the defendant was convicted of voluntary manslaughter arising from his wife's death. The Court of Appeals, in granting the defendant a new trial, held that portions of the autopsy report containing the medical examiner's conclusion and opinion that death ensued after attempted strangulation and blunt instrument trauma were improperly admitted into evidence under MRE 803(8). *Shipp*, *supra* at 340. The Court noted, however, that the examiner's recorded observations about the decedent's body were admissible under this rule. *Id*.

As with "business records," "public records" must contain only the observations of the reporting person and not the hearsay statements of others, unless these statements of others contained in the record ("hearsay within hearsay") are admissible under another exception to the "hearsay rule." A public record may itself contain hearsay statements, each of which is admissible only if it conforms independently with an exception to the hearsay rule. MRE 805. See *In re Freiburger*, 153 Mich App 251, 259–60 (1986) (third-party statements in police reports inadmissible hearsay).

H. Previous Judgment or Conviction

Child protective proceedings often arise from the same circumstances as a criminal prosecution. Furthermore, a prior order terminating a parent's parental rights may serve as a basis to assume jurisdiction over a current child or to terminate a parent's parental rights to a current child.* Thus, the issue of the admissibility of a prior order or judgment may arise in child protective proceedings.

*See Sections 4.6, 18.26, and 18.29–18.30.

MCL 600.2106 provides:

> "A copy of any order, judgment or decree, of any court of record in this state, duly authenticated by the certificate of the judge, clerk or register of such court, under the seal thereof, *shall be admissible in evidence in any court in this state, and shall be prima facie evidence of the jurisdiction of said court over the parties to such proceedings and of all facts recited therein*, and of the regularity of all proceedings prior to, and including the making of such order, judgment or decree." [Emphasis added.]

With regard to the orders, judgments, or decrees of a court of another state, MCL 600.2103 states:

> "The records and judicial proceedings of any court in the several states and territories of the United States and of any foreign country shall be admitted in evidence in the courts of this state upon being authenticated by the attestation of the clerk of such court with the seal of such court annexed, or of the officer in whose custody such records are legally kept with the seal of his office annexed."

MRE 803(22) allows admission of a judgment of conviction of a felony or two-year misdemeanor as substantive evidence of conduct at issue in a subsequent civil case. MRE 803(22) provides:

> "Evidence of a final judgment, entered after a trial or upon a plea of guilty (or upon a plea of nolo contendere if evidence of the plea is not excluded by MRE 410),* adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, [is admissible] to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility."

*MRE 410 is discussed further below.

> **Note:** By its terms, MRE 803(22) is limited to convictions and does not extend the hearsay exception to judgments of acquittal.

Thus, if the defendant was convicted by plea, judge, or jury of a felony or two-year misdemeanor, MRE 803(22) allows the judgment to be used as evidence to prove that the defendant committed the acts that led to the previous conviction. Although evidence of a misdemeanor conviction (one year or less) is inadmissible under MRE 803(22), evidence of a *plea* to a misdemeanor offense other than a motor vehicle violation would be admissible under MRE 801(d)(2)(a) as an admission by a party-opponent.

MRE 803(22) must be read in conjunction with MRE 410, which limits the use of pleas and plea-related statements. Under MRE 410(1)–(4), the following evidence is not admissible in a civil or criminal proceeding against a defendant who made a plea or participated in plea discussions:

> "(1) A plea of guilty which was later withdrawn;
>
> "(2) A plea of nolo contendere, except that, to the extent that evidence of a guilty plea would be admissible, evidence of a plea of nolo contendere to a criminal charge may be admitted in a civil proceeding to support a defense against a claim asserted by the person who entered the plea;

> "(3) Any statement made in the course of any proceedings under MCR 6.302* or comparable state or federal procedure regarding either of the foregoing pleas; or
>
> "(4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn."

*MCR 6.302 addresses the requirements for guilty and nolo contendere pleas in felony cases.

However, such statements are admissible in a subsequent civil proceeding if "another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it . . . ." MRE 410.

In *In re Andino,* 163 Mich App 764, 768–73 (1987), the Court of Appeals held that where independent proof has been presented of the conduct leading to a criminal charge to which the respondent-parent pled no contest, a judgment of conviction or sentence may be received as evidence in a termination of parental rights proceeding. Although MRE 410 prevents evidence of a plea of no contest, or statements made in connection with such a plea, from being admitted as evidence against the person entering the plea in "any civil proceeding," the rules applicable to the dispositional phase of child protective proceedings allow such evidence to be considered. These more specific rules govern. *Andino, supra* at 769–70. In addition, allowing consideration of such evidence is consonant with the general goal of the Juvenile Code, which is to protect children. *Id.* at 772–73.

I. Residual Exceptions to the "Hearsay Rule"

By invoking MRE 803(24) or MRE 804(b)(7), commonly known as "catch-all" hearsay exceptions, a party may seek admission of hearsay statements not covered under one of the firmly established exceptions in MRE 803(1)–(23). Under MRE 803(24), the following is not excluded by the hearsay rule, even though the declarant is available as a witness:

> "A statement not specifically covered by [MRE 803(1)–(23)] but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse

> party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant."

If the declarant is unavailable as a witness, a hearsay statement not admissible under the specific exceptions described in MRE 804(b)(1)–(6) may be admissible under MRE 804(b)(7), which is identical to MRE 803(24). A statement is admissible under MRE 803(24) or MRE 804(b)(7) upon a showing of: (1) circumstantial guarantees of trustworthiness equivalent to those of the established hearsay exceptions, (2) materiality, (3) probative value greater than that of other reasonably available evidence, (4) serving the interests of justice and the purposes of the rules of evidence, and (5) sufficient notice.

The "catch-all" hearsay exceptions are discussed in the following cases:

- *People v Katt*, 468 Mich 272 (2003)

The Michigan Supreme Court considered the "catch-all" hearsay exception contained in MCR 803(24). In *Katt*, the defendant was convicted of three counts of first-degree criminal sexual conduct. The evidence admitted at trial included testimony by a Children's Protective Services worker of statements that the seven-year old victim made to her regarding the alleged sexual abuse. Prior to the trial, the prosecutor had filed a motion to have the statements admitted under the "tender-years" rule, MRE 803A. The trial court denied the motion, but after a hearing, the court found that the statements were admissible under MRE 803(24). The defendant appealed his conviction claiming that it was error for the trial court to admit the statements under the "catch-all" exception. The defendant argued that MRE 803(24) requires that statements admitted under the hearsay exception may not be "specifically covered" by any of the categorical hearsay exceptions. Further, he argued that statements that are close to being admitted under another hearsay exception but that do not fit precisely into a recognized hearsay exception are not admissible under the residual hearsay exception. (This is commonly referred to as the "near miss" theory.) Therefore, the statements in question were inadmissible because they were "specifically covered" by the tender-years rule in MRE 803A. *Katt, supra* at 276–77.

The Michigan Supreme Court affirmed the defendant's conviction and declined to apply the "near miss" theory. The Court stated:

> "We agree with the majority of the federal courts and conclude that a hearsay statement is 'specifically covered' by another exception for purposes of MRE 803(24) only when it is admissible under that exception. Therefore, we decline to adopt the near-miss theory as part of our method for determining when hearsay

statements may be admissible under MRE 803(24)." *Katt, supra* at 286.

- *People v Lee*, 243 Mich App 163, 170–81 (2000):

The defendant was charged with armed robbery. Statements of the victim, who died before the defendant's trial, were admitted into evidence at trial under MRE 803(24). In those statements, the eighty-year-old victim identified the defendant as his assailant. The Court of Appeals found that the statements were properly admitted, noting that they had "a particularized trustworthiness." *Lee*, *supra* at 179. The victim's statements identifying his assailant were consistent, coherent, lucid, voluntary, based on his personal knowledge, and not the product of pressure or undue influence. Further, there was no evidence that the victim had a motive to fabricate or any bias against the defendant, or that the victim suffered from memory loss before the attack. The Court found no indication that cross-examination of the victim would have been of any utility, given his unwavering identification of his assailant, the absence of expectation that his testimony was expected to have varied from his prior identification, and the cognitive decline he suffered after being in the hospital for several days after the attack. *Id*. at 179-181.

- *People v Smith*, 243 Mich App 657, 688–90 (2000):

The Court of Appeals found that the trial court erred in concluding that hearsay statements to the police and to the declarant's friend were trustworthy and admissible under the former MRE 804(b)(6).* At the time of her statements to the police, the declarant had been accused of a crime and had good reason to incriminate the defendant to avoid prosecution herself. The Court of Appeals found that the statements to the police thus lacked sufficient trustworthiness. Addressing the declarant's statement to her friend, the Court found that the prosecution wrongfully sought to establish its trustworthiness "by showing that the statement was proved true at a different time or place." Because there was no showing that the statement was trustworthy based on the circumstances surrounding its making, the Court of Appeals ruled that the trial court erred in finding that the statement was trustworthy.

*Effective September 1, 2001, former MRE 804(b)(6) was redesignated MRE 804(b)(7).

- *People v Welch*, 226 Mich App 461, 464–68 (1997):

At his murder trial, defendant sought to introduce an eyewitness statement contained within a police report. Contained within that eyewitness statement was another statement, allegedly made by the victim after she was assaulted but before she jumped off a bridge to her death, that she was going to kill herself. The trial court excluded this hearsay evidence, finding that each level of hearsay, particularly the eyewitness statement, lacked sufficient circumstantial guarantees of trustworthiness because a significant question existed concerning whether the eyewitness actually heard the victim make the statement. *Id*. at 465-466. The Court of Appeals, after looking to

analogous federal evidentiary rules—FRE 803(24) and FRE 804(b)(5)—applied a federal trustworthiness requirement, which is satisfied when a trial court can conclude that cross-examination would be of "marginal utility." Using this standard, the Court of Appeals found no abuse of discretion in the trial court's finding of untrustworthiness because the cross-examination of the eyewitness "would have been of more than marginal utility." *Welch*, *supra* at 468.

11.6 Child Witnesses Are Not Presumed Incompetent

Every person is presumed competent to be a witness. MRE 601 provides:

> "Unless the court finds after questioning a person that the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably, every person is competent to be a witness except as otherwise provided in [the Michigan Rules of Evidence]."*

*MCL 600.2163 previously required the court to determine the competency of witnesses under ten years old. That statute was repealed by 1998 PA 323, effective August 3, 1998.

Competency to testify is a matter within the discretion of the trial court. The trial court may conduct an examination to determine a witness' competency. *People v Bedford*, 78 Mich App 696, 705 (1977). If an examination is conducted, the court may question the proposed witness or allow counsel to do so. *People v Garland*, 152 Mich App 301, 309 (1986). The court's examination of the witness may be, but is not required to be, outside the jury's presence. See *People v Washington*, 130 Mich App 579, 581–82 (1983), and *People v Wright*, 149 Mich App 73, 74 (1986).

In determining whether a witness will be able to testify understandably and truthfully, the court should evaluate the witness' ability to observe, remember, and recount what has been observed and remembered. The court should also evaluate the witness' understanding of the duty to tell the truth. *United States v Benn*, 476 F2d 1127, 1130 (1972). If these abilities exist on a level that allows the witness to participate meaningfully in the proceedings, determination of the degree of the witness' abilities must be left to the trier of fact. See *People v Jehnsen*, 183 Mich App 305, 307–08 (1990) (four-year-old victim competent to testify), *People v Norfleet*, 142 Mich App 745, 749 (1985) (reversible error in finding seven-year-old witness incompetent to testify), and *People v Breck*, 230 Mich App 450, 457–58 (1998) (developmentally disabled complainant competent to testify).

11.7 In-Camera Conferences

In *In re Crowder,* 143 Mich App 666, 668–71 (1985), the Court of Appeals found error in the trial court's holding an in-camera conference with one of the respondent-parent's children. The Court held that in-camera

conferences should not be held in child protective proceedings if the child is to discuss facts in dispute. However, a judge or referee may hold an in-camera conference to discuss a child's placement preferences.

11.8 Alternative Procedures to Obtain Testimony of Child or Developmentally Disabled Witnesses

A. General Protections

Under MRE 611(a), a trial court is given broad authority to employ special procedures to protect any victim or witness while testifying. MRE 611(a) provides:

> "(a) *Control by court*. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) *protect witnesses from harassment or undue embarrassment*." [Emphasis added.]

Unlike the statute discussed in the next section, MRE 611(a) contains no age or developmental disability restrictions and thus may be applied to all victims and witnesses. Moreover, MRE 611(a) contains no restrictions as to the specific type of procedures or protections that may be employed to protect victims and witnesses. Some of these procedures may include the protections discussed in the next section, such as allowing the use of dolls or mannequins, providing a support person, rearranging the courtroom, shielding or screening the witness from the defendant, and allowing close-circuit television or videotaped depositions in lieu of live, in-court testimony.

In child protective proceedings, the court may appoint an impartial person to address questions to a child witness as the court directs. MCR 3.923(F).

B. Protections for Child or Developmentally Disabled Witnesses

MCL 712A.17b(18) provides that the procedures in MCL 712A.17b are in addition to other protections or procedures afforded to a witness by law or court rule. The special statutory protections in MCL 712A.17b apply to witnesses who are either:

- under 16 years of age, or
- 16 years of age or older and developmentally disabled. MCL 712A.17b(1)(d).

MCL 712A.17b(1)(b) provides that "developmental disability" is defined in MCL 330.1100a(20)(a)–(b). If applied to a minor from birth to age five, "developmental disability" means a substantial developmental delay or a specific congenital or acquired condition with a high probability of resulting in a developmental disability as defined below if services are not provided. MCL 330.1100a(20)(b).

If applied to an individual older than five years of age, "developmental disability" means a severe, chronic condition that meets all of the following additional conditions:

- is manifested before the individual is 22 years old;
- is likely to continue indefinitely;
- results in substantial functional limitations in three or more of the following areas of major life activity:
  - self-care;
  - receptive and expressive language;
  - learning;
  - mobility;
  - self-direction;
  - capacity for independent living;
  - economic self-sufficiency; and
- reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services that are of lifelong or extended duration and are individually planned and coordinated. MCL 330.1100a(20)(a)(ii)–(v).

A "developmental disability" includes only a condition that is attributable to a mental impairment or to a combination of mental and physical impairments, but does not include a condition attributable to a physical impairment unaccompanied by a mental impairment. MCL 712A.17b(1)(a).

If the age or disability requirements of MCL 712A.17b are met, a party or the court may move to allow one or more of the following measures to protect a witness.

> **Note:** MCL 712A.17b also provides for taking a child's videorecorded statement during an investigation of suspected child abuse or neglect. A viderecorded statement is only admissible during the dispositional phase of proceedings, not at

a trial. MCL 712A.17b(5). See Section 2.10 for discussion of videorecorded statements.

Dolls or mannequins. The witness must be permitted to use dolls or mannequins, including, but not limited to, anatomically correct dolls or mannequins, to assist the witness in testifying on direct and cross-examination. MCL 712A.17b(3).

Support person. MCL 712A.17b(4) provides that a child or developmentally disabled witness who is called upon to testify must be permitted to have a support person sit with, accompany, or be in close proximity to the witness during his or her testimony. A notice of intent to use a support person must name the support person, identify the relationship the support person has with the witness, and give notice to all parties to the proceeding that the witness may request that the named support person sit with the witness when the witness is called upon to testify during any stage of the proceeding. The notice of intent to use a named support person must be filed with the court and served upon all parties to the proceeding. The court shall rule on a motion objecting to the use of a named support person before the date on which the witness desires to use the support person.

In *People v Jehnsen,* 183 Mich App 305, 308–11 (1990), the Court of Appeals held that the trial court did not abuse its discretion by allowing the four-year-old victim's mother to remain in the courtroom following the mother's testimony. Although the victim's mother engaged "in nonverbal behavior which could have communicated the mother's judgment of the appropriate answers to questions on cross-examination," the trial court found no correlation between the mother's conduct and the victim's answers. *Jehnsen, supra* at 310. See also *People v Rockey,* 237 Mich App 74, 78 (1999) (where there was no evidence of nonverbal communication between the victim and her father, the trial court did not err in allowing the seven-year-old sexual assault victim to sit on her father's lap while testifying).

Rearranging the courtroom. A party may make a motion to rearrange the courtroom to protect a child or developmentally disabled victim-witness. If the court determines on the record that it is necessary to protect the welfare of the witness, the court shall order one or both of the following:

> "(a) In order to protect the witness from directly viewing the respondent, the courtroom shall be arranged so that the respondent is seated as far from the witness stand as is reasonable and not directly in front of the witness stand. The respondent's position shall be located so as to allow the respondent to hear and see all witnesses and be able to communicate with his or her attorney.
>
> "(b) A questioner's stand or podium shall be used for all questioning of all witnesses by all parties, and shall be

> located in front of the witness stand." MCL 712A.17b(15)(a)–(b).

In determining whether it is necessary to rearrange the courtroom to protect the witness, the court shall consider the following:

> "(a) The age of the witness.
>
> "(b) The nature of the offense or offenses." MCL 712A.17b(10)(a)–(b).

Using videotape depositions or closed-circuit television when other protections are inadequate. MCR 3.923(E) states as follows:

> "(E) *Electronic Equipment; Support Person.* The court may allow the use of closed-circuit television, speaker telephone, or other similar electronic equipment to facilitate hearings or to protect the parties. The court may allow the use of videotaped statements and depositions, anatomical dolls, or support persons, and may take other measures to protect the child witness as authorized by MCL 712A.17b."

The court may order a videorecorded deposition of a child or developmentally disabled victim-witness on motion of a party or in the court's discretion. MCL 712A.17b(16) provides that if the court finds on the record that the witness is or will be psychologically or emotionally unable to testify even with the benefit of the protections set forth above, the court must order that a videorecorded deposition of a witness be taken to be admitted at the adjudication stage instead of the live testimony of the witness. The court must find that the witness would be unable to testify truthfully and understandably in the offender's presence, not that the witness would "stand mute" when questioned. See *People v Pesquera,* 244 Mich App 305, 311 (2001).

If the court grants the party's motion to use a videorecorded deposition, the deposition must comply with the requirements of MCL 712A.17b(17). This provision requires that:

- the examination and cross-examination of the witness must proceed in the same manner as if the witness testified at trial; and
- the court must order that the witness, during his or her testimony, not be confronted by the respondent or defendant, but the respondent or defendant must be permitted to hear the testimony of the witness and to consult with his or her attorney.

In *In re Brock,* 442 Mich 101, 105–15 (1993), the Court addressed a due process challenge* to the use of alternative procedures to obtain the testimony of a child witness. After expert testimony on the issue, the trial court found that the three-year-old child would suffer psychological harm were she to testify in the courtroom, with or without the respondent-parents present. The trial court ordered a videotaped deposition conducted by an impartial questioner. The respondent-parents were not allowed face-to-face confrontation or cross-examination of the child, but the impartial questioner did ask questions that the parents had submitted. The Michigan Supreme Court held that procedural due process requirements were satisfied in this case. *Id.* at 107. There was little risk of erroneous deprivation of the parents' protected right to the management of their children because a child may still be returned to a parent after the court has assumed jurisdiction, and termination of parental rights may be ordered only on presentation of clear and convincing evidence. *Id.* at 111–12. Also, confrontation and cross-examination would be of little value to the truth-seeking function of a trial if the child was found to be traumatized by the procedures. *Id.* at 112. The state has a significant interest in the protection of children. *Id.* at 112–13.

*Although the Sixth Amendment right to confrontation does not apply directly to a child protective proceeding, a parent's substantial liberty interest may require that he or she have the opportunity to cross-examine, face-to-face, the witnesses against him or her. *Brock, supra* at 108–10.

In order to preserve a respondent's due process rights, including the right to confront witnesses against him or her face-to-face, the court must hear evidence and make particularized, case-specific findings that the procedure is necessary to protect the welfare of a child witness who seeks to testify. In *Maryland v Craig,* 497 US 836, 855–56 (1990), the United States Supreme Court described the necessary findings:

> "The requisite finding of necessity must of course be a case-specific one: the trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. . . . The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. . . . Denial of face-to-face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma. In other words, if the state interest were merely the interest in protecting child witnesses from courtroom trauma generally, denial of face-to-face confrontation would be unnecessary because the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present. Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than de minimis, i.e., more than 'mere nervousness or excitement or some reluctance to testify'. . . ." (Citations omitted.)

See also *In re Vanidestine,* 186 Mich App 205, 209–12 (1990) (*Craig* applied to juvenile delinquency case).

C. Notice of Intent to Use Special Procedure

MCR 3.922(E) requires a party to file and serve a notice of intent to use a special procedure discussed in this section. This rule states in relevant part:

"(E) Notice of Intent.

> "(1) Within 21 days after the parties have been given notice of the date of trial, but no later than 7 days before the trial date, the proponent must file with the court, and serve all parties, written notice of the intent to:
>
> > (a) use a support person, including the identity of the support person, the relationship to the witness, and the anticipated location of the support person during the hearing.
> >
> > (b) request special arrangements for a closed courtroom or for restricting the view of the respondent/defendant from the witness or other special arrangements allowed under law and ordered by the court.
> >
> > (c) use a videotape deposition as permitted by law.
> >
> > . . . .
>
> "(2) Within 7 days after receipt or notice, but no later than 2 days before the trial date, the nonproponent parties must provide written notice to the court of an intent to offer rebuttal testimony or evidence in opposition to the request and must include the identity of the witnesses to be called.
>
> "(3) The court may shorten the time periods provided in subrule (E) if good cause is shown."

11.9 "Other Acts" Evidence

This section discusses the admissibility of a respondent's past acts of child maltreatment and maltreatment of others. Subsection A discusses the admissibility of evidence regarding a respondent's maltreatment of a child's sibling to determine whether the respondent will provide proper care and custody for the child. Subsection B briefly discusses the admissibility of

"other acts" evidence under MRE 404(b). A party may seek to admit evidence under MRE 404(b) of a respondent's prior maltreatment of the same child at issue in the current child protective proceeding or a respondent's prior maltreatment of another person not involved in the current proceeding.

A. Evidence of the Treatment of One Child Is Admissible to Show Treatment of Sibling

Evidence of the treatment of one child is probative of how the parent may treat the child's siblings. See M Civ JI 97.07, and the following cases:

- *In re LaFlure,* 48 Mich App 377, 392 (1973) (respondent's treatment of her younger son was relevant at hearing to terminate respondent's parental rights to her older son);
- *In re Dittrick Infant,* 80 Mich App 219, 222 (1977) (where respondents' parental rights were terminated to respondent-mother's first child on grounds of continuing physical and sexual abuse, allegations of the neglect of the first child were relevant to a finding of neglect sufficient to allow the court to take jurisdiction over respondents' second child);
- *In re Kantola,* 139 Mich App 23, 28–29 (1984) (where evidence showed that respondents treated their son well but sexually, physically, and verbally abused their daughters, respondents' treatment of their son was not conclusive of their ability to provide a fit home for their daughters);
- *In re Futch,* 144 Mich App 163, 166–68 (1984) (evidence that respondents were convicted of manslaughter in the beating death of respondent-mother's first child supported termination of respondents' parental rights to a subsequent child);
- *In re Andeson,* 155 Mich App 615, 622 (1986) (where evidence suggested that respondent's physical abuse of a sibling led to the sibling's death, the probate court properly considered that evidence in terminating respondent's parental rights to another child);
- *In re Smebak,* 160 Mich App 122, 128–29 (1987) (evidence that respondent-mother's mental illness prevented her from providing proper care of sibling was probative of her ability to care for another child);
- *In re Emmons,* 165 Mich App 701, 704–05 (1988) (evidence of respondent-father's prior guilty plea to charge of sexually assaulting child's siblings was admissible to provide basis for jurisdiction over child); and

- *In re Powers,* 208 Mich App 582, 592–93 (1995) (where respondent-custodian was found to have physically abused respondent-mother's first child, evidence of that abuse was relevant to respondent-custodian's ability to provide proper care and custody for a sibling subsequently born to respondent-custodian and respondent-mother).

B. Evidence of Other Crimes, Wrongs, or Acts

As noted above in Section 11.9(A), evidence of a respondent's maltreatment of a sibling is admissible to prove the respondent's inability to provide proper care or custody for another child. A party may also seek to admit evidence of a respondent's past maltreatment of the same child or a non-sibling. MRE 404(b)(1) governs the admissibility of evidence of other crimes, wrongs, or acts. That rule states:

> "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case."

***VanderVliet* test.** MRE 404(b) codifies the requirements set forth in *People v VanderVliet*, 444 Mich 52 (1993). The admissibility of other acts evidence under MRE 404(b), except for modus operandi evidence used to prove identity,* is generally governed by the test established in *VanderVliet*, which is as follows:

*Modus operandi evidence is not discussed in this benchbook.

- The evidence must be offered for a purpose other than to show the propensity to commit a crime or other bad act. *Id*. at 74.
- The evidence must be relevant under MRE 402 to an issue or fact of consequence at trial. *VanderVliet*, *supra* at 74.
- The trial court should determine under MRE 403 whether the danger of undue prejudice substantially outweighs the probative value of the evidence, in view of the availability of other means of proof and other appropriate facts. *VanderVliet*, *supra* at 74-75.
- Upon request, the trial court may provide a limiting instruction under MRE 105, cautioning the jury to use the evidence for its proper purpose and not to infer a bad or criminal character that caused the respondent to commit the charged offense. *VanderVliet*, *supra* at 75.

The *VanderVliet* case underscores the following principles of MRE 404(b):

- There is no presumption that other acts evidence should be excluded. *VanderVliet*, *supra* at 65.
- The rule's list of "other purposes" for which evidence may be admitted is not exclusive. Evidence may be presented to show any fact relevant under MRE 402, except a respondent's propensity to commit criminal or other bad acts. *VanderVliet*, *supra*.
- A respondent's general denial of the charges does not automatically prevent the prosecutor from introducing other acts evidence at trial. *Id*. at 78-79.
- MRE 404(b) imposes no heightened standard for determining logical relevance or for weighing the prejudicial effect versus the probative value of the evidence. *VanderVliet*, *supra* at 68, 71.

Case law. The following appellate cases address the admissibility of "other-acts" evidence under MRE 404(b).

- *People v Hine*, 467 Mich 242 (2002):

The defendant was convicted by a jury of first-degree felony murder and first-degree child abuse in the death of defendant's girlfriend's two-and-a-half-year-old daughter. The victim, who died from multiple blunt-force injuries, sustained severe internal injuries, numerous circular bruises on her abdomen, and a bruise across the bridge of her nose. The prosecutor sought to introduce "other acts" evidence under MRE 404(b) to show, among other things, a common scheme, plan, or system in perpetrating assaults. Three of defendant's former girlfriends, one of whom was the victim's mother, testified at a pretrial hearing. Two of these witnesses testified that defendant perpetrated "fish hook" assaults on them: a method where defendant put his fingers inside their mouths and forcefully stretched their lips. One witness testified that defendant "head-butted" her, using his forehead to strike her nose. Each of these witnesses also testified that defendant struck, poked, grabbed, threw, and kneed them. The trial court admitted this testimony, but the Court of Appeals reversed defendant's conviction, holding that substantial dissimilarities existed between the assaults on defendant's former girlfriends and the injuries sustained by the victim, and that the danger of unfair prejudice resulting from the admission of such evidence outweighed any marginal probative value. The Michigan Supreme Court remanded to the Court of Appeals for reconsideration in light of *People v Sabin (After Remand),* 463 Mich 43 (2000). The Court of Appeals again reversed, finding defendant's assaultive behavior inadmissible under *Sabin* since it was used to prove the "very act" that was the object of the proof, and because of the dissimilarities between the uncharged and charged conduct.

The Michigan Supreme Court reversed the Court of Appeals and remanded the case to that court for consideration of the defendant's remaining appellate issues. The Court stated that the alleged "fish hook" assaults against defendant's former girlfriends were similar to the method or system that could have caused fingernail marks on the victim's cheek. In addition, the bruises on the victim's abdomen were consistent with injuries resulting from being forcefully poked in the abdomen. Noting that evidence of uncharged conduct need only support an inference that a defendant employed a common scheme, plan, or system in committing the charged offense, *Sabin*, *supra* at 65-66, the Court concluded that the testimony of defendant's former girlfriends contained sufficient commonality with evidence of the causes of the victim's injuries to permit such an inference. *Hine, supra* at 251–52.

- *People v DerMartzex*, 390 Mich 410 (1973):

The defendant was convicted of assault with intent to rape a ten-year-old Toronto resident who spent part of the summer at the Detroit home of the defendant and his wife. Over defendant's objection, the victim testified concerning other prior, uncharged instances of defendant's sexual mistreatment of her both while accompanying her from Toronto to Detroit and while staying at his home. The Supreme Court upheld the admission of this evidence, finding that relevant, probative evidence of other sexual acts between the defendant and the victim of an alleged sexual assault may be admissible if the defendant and victim live in the same household and if, without such evidence, the victim's testimony would seem incredible. The Supreme Court explained the purpose for admitting such evidence as follows:

> "The principal issue confronting a jury in most statutory rape cases, and particularly so where the charged offense is *attempted* statutory rape, is the credibility of the alleged victim. Limiting her testimony to the specific act charged and not allowing her to mention acts leading up to the assault would seriously undermine her credibility in the eyes of the jury. Common experience indicates that sexual intercourse and attempts thereat are most frequently the culmination of prior acts of sexual intimacy. . . . Allowing the admission of evidence of antecedent sexual acts preceding the charged assault is especially justified where an inchoate offense is charged against a member of the victim's household. Otherwise the testimony of the victim concerning the seemingly isolated unsuccessful assault may well appear incredible." We do not wish to be understood as holding that other acts of sexual intimacy between the parties is always admissible. The trial judge . . . enjoys the discretion of excluding relevant evidenct if its probative value is outweighed by the risks of unfair prejudice,

> confusion of issues or misleading the jury." [Emphasis in original.] *Id*. at 414-415.

The opinion in *DerMartzex* was not decided under MRE 404(b). In *People v Jones*, 417 Mich 285, 289–90 (1983), the Supreme Court declined to extend its holding in *DerMartzex* to include instances of sexual acts between the defendant and household members *other than the complainant*. However, it did state that such evidence may be admissible under MRE 404(b). *Jones*, *supra* at 290, n 1. While the Supreme Court has declined to reconsider its decision in *Jones*, see *Sabin*, *supra* at 69–70, the Court of Appeals has extended the so-called *DerMartzex* rule to include admission of testimony describing *subsequent*, uncharged sexual acts, *People v Puroll*, 195 Mich App 170, 171 (1992), and to include admission of testimony from victims who were not necessarily members of the same household as defendant: a seven-year-old boy whom defendant often babysat, *People v Garvie*, 148 Mich App 444, 450 (1986), and a 15-year-old niece who was visiting defendant's home at the time of offense, *People v Wright*, 161 Mich App 682, 687–89 (1987).

- *People v Knox*, 256 Mich App 175 (2003):

The defendant was convicted by a jury of second-degree murder and first-degree child abuse in the death of his four-month old son. The prosecutor argued that the victim sustained the injuries that led to his death while in the defendant's care. The defendant argued that the victim sustained the injuries while in the victim's mother's care. At trial, the prosecutor elicited testimony regarding past acts of abuse suffered by the child. In addition, during the case-in-chief, the prosecutor introduced evidence of "other acts" of the victim's mother, including evidence of her assets as a mother, her love for her children and her knowledge of child rearing. The defendant did not object to the admission of this evidence. On appeal, the defendant objected to the evidence as improper character evidence. The Court of Appeals held that evidence of past abuse of the child was admissible to show that the injuries resulting in the child's death were not accidental. *Id.* at 197–98. "[W]hen 'offered to show that certain injuries are a product of child abuse, rather than accident, evidence of prior injuries is relevant even though it does not purport to prove the identity of the person who might have inflicted those injuries.'" *Id.,* quoting *Estelle v McGuire,* 502 US 62, 69 (1991). Regarding the evidence concerning the child's mother's parenting skills and love for her children, the Court of Appeals held:

> "[T]he rules of evidence do not provide that the prosecution may preempt a defense that someone other than defendant committed the crime by arguing that the person the defense blames was 'too good' to have committed the crime. Additionally, the evidence of [the victim's mother's] good character was improper under MRE 404(b) because it did not serve one of the

> noncharacter purposes articulated in that rule. This evidence was used to demonstrate that [the victim's mother] acted in conformity with her good character on the night of the incident, in contrast to [the defendant's] alleged bad character, and thus that [defendant's] defense should not be believed. Therefore, we conclude, even in light of *Hine*, that [the defendant] has demonstrated that it was plain error for the trial court to admit the evidence that [the victim's mother] was a good, loving parent who could not have committed the crime." *Knox, supra* at 200–01.

Although admission of the evidence was plain error, the Court determined that the error in admitting this evidence did not affect the outcome of the trial and defendant was not entitled to relief. *Id.* at 201.

The Court of Appeals further found that the defendant had not shown that the probative value of the evidence was substantially outweighed by the danger of prejudice. *Id*. at 581.

- *People v Daoust,* 228 Mich App 1, 11–14 (1998):

Defendant was charged with two counts of first-degree child abuse based on injuries to the head and hand of his girlfriend's daughter. In addition to these injuries, the child suffered numerous bruises. The child's mother was also charged with first-degree child abuse. She initially denied involvement with the defendant, and admitted responsibility for some of the bruises on the child's body. However, at defendant's trial she testified that the injuries to the child's head and hand were suffered while the child was in the care of the defendant. She further stated that the defendant had threatened to harm her and the child if she sought medical attention for the child's injuries, and that she had attempted to deflect the blame for the injuries away from the defendant because she was afraid of him.

A jury convicted defendant of second-degree child abuse based on the injury to the child's hand. On appeal, defendant asserted that the trial court erroneously admitted testimony regarding a prior incident in which bruises on the child's body had been reported to the police. The child's baby-sitter testified that defendant was angry with her for reporting the bruises to the police. She further stated that defendant had told her that he liked to spank children "hard enough to where they'll feel it." Although both defendant and the child's mother told the baby-sitter that the mother had caused the bruises, the mother later testified at trial that defendant had been responsible. The Court of Appeals upheld the trial court's decision to admit this evidence, finding that it was offered for the proper purpose of explaining the relationship between the defendant, the child, and the child's mother with respect to the care and discipline of the child. Defendant testified at trial that he had never participated in the child's discipline, explaining that discipline was the mother's responsibility. The prior acts

evidence tended to disprove this testimony, showing that defendant believed in extreme physical discipline and that he participated in the child's discipline. The evidence was thus probative of defendant's possible motivation for causing the charged injuries. 228 Mich App at 13-14.

11.10 Evidence Admitted at a Hearing May Be Considered at Subsequent Hearings

Evidence admitted at one hearing in a child protective proceeding may be considered as evidence at all subsequent hearings. See *In re Slis,* 144 Mich App 678, 685 (1985) (in its findings of fact and conclusions of law, trial judge summarized family's history of involvement with community service agencies); *In re Adrianson,* 105 Mich App 300, 317 (1981) (allegations admitted at hearings on temporary custody of children may be considered by court at termination hearing); *In re Sharpe,* 68 Mich App 619, 625–26 (1976) (hearings in protective proceedings are to be considered "as a single continuous proceeding"); and *In re LaFlure,* 48 Mich App 377, 391 (1973) (due to the nature of the decision to terminate parental rights, court must be apprised of all relevant circumstances). The trial court may also take judicial notice of its court file. See MRE 201.

11.11 Expert Testimony in Child Protective Proceedings

Expert testimony is common in child protective proceedings. Expert testimony may be presented during any phase of the proceedings. It is also required in certain circumstances. If a child is placed outside of his or her home, and if a physician has diagnosed the child's abuse or neglect as involving failure to thrive, Munchausen Syndrome by Proxy, Shaken Baby Syndrome, a bone fracture that is diagnosed as a result of abuse or neglect, or drug exposure, the court must allow the child's attending or primary care physician to testify regarding the Case Service Plan at a judicial proceeding to determine if the child is to be returned home. MCL 712A.18f(6)–(7). Furthermore, the Indian Child Welfare Act (ICWA) requires expert testimony before placing an Indian child outside of his or her home or terminating parental rights.*

*See Section 13.6 for discussion of required physician testimony. See Section 20.12 for discussion of expert testimony under ICWA.

Rules of evidence. If a proponent offers expert testimony at a trial or a hearing on termination of parental rights at which the rules of evidence apply, the following rules must be observed. MRE 702* provides the standard for admissibility of expert testimony:

*The text of MRE 702 quoted below is effective January 1, 2004.

> "If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony

> is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

The staff comment to amended MRE 702 states as follows:

> "The July 22, 2003, amendment of MRE 702, effective January 1, 2004, conforms the Michigan rule to Rule 702 of the Federal Rules of Evidence, as amended effective December 1, 2000, except that the Michigan rule retains the words 'the court determines that' after the word 'If' at the outset of the rule. The new language requires trial judges to act as gatekeepers who must exclude unreliable expert testimony. See *Daubert v Merrell Dow Pharmaceuticals, Inc,* 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), and *Kumho Tire Co, Ltd v Carmichael,* 526 US 137; 119 S Ct 1167; 143 L Ed 2d 238 (1999). The retained words emphasize the centrality of the court's gatekeeping role in excluding unproven expert theories and methodologies from jury consideration."

Daubert applies to scientific expert testimony; *Kumho Tire* applies *Daubert* to nonscientific expert testimony (e.g., testimony from social workers and psychologists or psychiatrists). *Daubert, supra* 509 US at 593–94, contains a nonexhaustive list of factors for determining the reliability of expert testimony, including testing, peer review, error rates, and acceptability within the relevant scientific community. See also MCL 600.2955, which governs the admissibility of expert testimony in tort cases, and which contains a list of factors similar to the list in *Daubert.*

MRE 703* governs the bases of opinion testimony:

*The text of MRE 703 quoted below was effective September 1, 2003.

> "The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence thereafter."

Former rule 703 left to the trial court's discretion the decision whether facts or data "essential" to an expert's testimony must be admitted into evidence. The Staff Comment to amended MRE 703 states that the "modification of MRE 703 corrects a common misreading of the rule by allowing an expert's opinion only if that opinion is based exclusively on evidence that has been introduced into evidence in some way other than through the expert's hearsay testimony."

Opinions and diagnoses are admissible under MRE 803(6).* A party may examine an expert witness using hypothetical situations based on facts already in evidence. *In re Rinesmith,* 144 Mich App 475, 482–83 (1985).

*See Section 11.5(F), above.

MRE 704 governs opinions on ultimate issues:

> "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

MRE 705 governs disclosure of facts or data underlying the opinions:

> "The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination."

MRE 706(a) authorizes a court to appoint an expert witness:

> "(a) *Appointment.* The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness."

See also MCR 3.923(B) and MCL 712A.12, which allow a court to order an examination of a parent, guardian, legal custodian, or child. A party requesting an expert witness must establish a need for the witness. In *In re Bell,* 138 Mich App 184, 187–88 (1984), the Court of Appeals held that a parent had failed to establish such a need where three physicians and a psychiatrist testified for the petitioner, but the parent failed to show that the petitioner's expert witnesses were biased against her.

Expert testimony by physicians. Like other expert testimony, an examining physician's testimony will be admissible if the expert possesses specialized knowledge that will assist the trier of fact in understanding the evidence or determining a fact in issue under MRE 702. *People v Smith*, 425 Mich 98, 112 (1986).

In the companion cases of *People v Smith* and *People v Mays*, 425 Mich 98 (1986), the Michigan Supreme Court expressly refuted the notion previously articulated in *People v McGillen #2*, 392 Mich 278, 285 (1974), that an examining physician is not permitted to lend "expert opinion testimony as to the crucial issue of whether or not the prosecutrix was actually raped at a specific time and place." The Supreme Court in *Smith*, referring to this specific language in *McGillen #2*, held:

> "[W]e would emphasize that the quoted language is dicta, as the doctor there did *not* testify that the defendant had raped the victim at a specific time or place, or that she did not consent. Further, to the extent that this language suggests that an opinion regarding an ultimate issue is never permitted, such a blanket prohibition would clearly conflict with MRE 704." *Smith*, *supra* at 111. [Emphasis in original.]

In *Smith*, however, the Supreme Court found reversible error in the admission of the examining physician's opinion that the complainant had been sexually assaulted. The Supreme Court found that the opinion was based not on any findings within the realm of the expert's medical capabilities or expertise as an obstetrician/gynecologist, but rather on the emotional state and history of the complainant. *Id*. at 112. In *Mays*, the Supreme Court upheld the admission of the examining physician's testimony describing abrasions at the entrance of the complainant's vagina. The Court also upheld the admission of the physician's opinion that the complainant had been penetrated against her will, because the opinion was grounded upon objective evidence, even though other factors were also considered, such as the emotional state of the complainant and the expert's past experience with sexual assault cases. *Id*. at 114–15.

In cases involving child sexual abuse, a *psychologist's* opinion as to whether abuse actually occurred "is a legal question outside the scope of the psychologist's expertise and therefore not a proper subject of expert testimony." *In re Brimer,* 191 Mich App 401, 407 (1991), citing *People v Beckley,* 434 Mich 691, 726–29 (1990). It is also improper for the psychologist to evaluate the child's credibility. *Brimer, supra,* quoting *Beckley, supra,* at 737.

Expert testimony regarding child sexual abuse victim behaviors. Expert testimony regarding "rape trauma syndrome" is inadmissible to prove that a sexual assault occurred. *People v Pullins*, 145 Mich App 414, 419–22 (1985). In *Pullins*, a first-degree criminal sexual conduct case involving a

six-year-old victim, the trial court admitted testimony from a therapist regarding the victim's post-incident behavior—being afraid to answer the phone and having trouble sleeping—as rape trauma syndrome evidence to establish that criminal sexual conduct occurred. The Court of Appeals held:

> "We . . . hold that evidence of rape trauma syndrome is not admissible . . . to prove that a rape in fact occurred. However . . . we do not mean to imply that evidence of emotional and psychological trauma suffered by a complaining witness in a rape case is inadmissible. Such evidence is relevant and jurors are fully competent to consider such evidence in determining whether a rape occurred, but it should not be presented with an aura of scientific reliability unless the *Frye* test* is met. *Id*. at 421–22.

*Effective January 1, 2004, the "Frye test" no longer governs admissibility of scientific expert testimony in Michigan. See *Frye v United States,* 54 App DC 46 (1923), and *People v Davis,* 343 Mich 348 (1955), and the amendment to MRE 702, quoted above.

Additionally, a majority of justices of the Michigan Supreme Court, in *People v Beckley*, 434 Mich 691, 724, 729 (1990), concluded that "child sexual abuse accommodation syndrome" evidence is unreliable as an indicator of abuse and, as such, is inadmissible to show that sexual abuse has occurred. A majority of justices also held that an expert witness may not testify that the victim's allegations are true. A plurality of the justices held that an expert witness may testify that the particular behavior of the allegedly sexually abused child was characteristic of sexually abused children in general. However, this plurality of justices concluded that such testimony is only admissible to rebut an inference that a victim's behavior following the incident was inconsistent with that of a sexually abused child. *Id.* at 710.

In *People v Peterson*, 450 Mich 349, 352 (1995), modified 450 Mich 1212 (1995),* the Michigan Supreme Court reaffirmed and modified its holding in *Beckley*, *supra*, by reiterating that:

*This case was also consolidated with *People v Smith*, discussed *infra*.

- An expert may not testify that the sexual abuse occurred.
- An expert may not vouch for the veracity of a victim.
- An expert may not testify whether the defendant is guilty.

The Supreme Court in *Peterson*, *supra* at 352–53, clarified aspects of child sexual abuse expert testimony by holding that (1) an expert may testify in the prosecutor's case-in-chief (rather than only in rebuttal) regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed as inconsistent with that of an actual abuse victim; and (2) an expert may testify regarding consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility. *Id*.

Further, the Supreme Court specified two circumstances in which expert testimony is admissible to show that the victim's behavior was consistent with sexually abused victims generally:

> "Unless a defendant raises the issue of the particular child victim's postincident behavior or attacks the child's credibility, an expert may not testify that the particular child victim's behavior is consistent with that of a sexually abused child." *Id.* at 373-374.

In a case involving a child complainant's post-incident behavior of attempting suicide, the Michigan Supreme Court, in *People v Lukity,* 460 Mich 484, 500–01 (1999), found no abuse of discretion by the trial court in admitting expert testimony comparing the child victim's behavior with that of sexually abused children. In *Lukity*, the defendant was convicted of first-degree criminal sexual conduct against his 14-year-old daughter. At trial, the complainant testified that defendant sexually assaulted her over 40 times during a two-year period. She also testified that, after reporting the sexual assaults, she attempted suicide. During the defense opening statement, defense counsel stated that the complainant had "serious problems" that could have affected her ability to "recount and describe." The defense theory of the case was that complainant's testimony was not believable, since she had emotional problems unrelated to the sexual abuse. An expert witness testified to the general characteristics of sexual abuse victims, including specific testimony regarding complainant's psychiatric behaviors being consistent with those of sexual abuse victims. The expert did, however, acknowledge that some characteristics of sexual abuse victims, such as attempting suicide, were also consistent with other types of traumas. The Michigan Supreme Court, applying *Peterson*, found no error requiring reversal in the admission of this expert testimony:

> "[The defense] theory raised the issue of complainant's post-incident behavior, e.g., her suicide attempts. Under *Peterson*, raising the issue of a complainant's post-incident behavior opens the door to expert testimony that the complainant's behavior was consistent with that of a sexual abuse victim. Accordingly, the trial court did not abuse its discretion in allowing [the expert] to testify.
>
> "Moreover, defendant effectively cross-examined [the expert] and convincingly argued in closing that the fact that a behavior is 'consistent' with the behavior of a sexual abuse victim is not dispositive evidence that sexual abuse occurred. Specifically, he argued that 'almost any behavior is not inconsistent with being a victim of sexual assault.'" *Lukity*, *supra* at 501–02.

In *People v Smith*, the case consolidated with *Peterson*, the Michigan Supreme Court found "an almost perfect model for the limitations that must

be set in allowing expert testimony into evidence in child sexual abuse cases." 450 Mich at 381. In that case, the victim delayed reporting the abuse for five years, but the defendant did not ask the victim any questions suggesting that the delay in reporting was inconsistent with the alleged abuse or attack the victim's credibility. The trial court allowed a single expert to clarify, during the prosecutor's case-in-chief, that child sexual abuse victims frequently delay reporting the abuse. The expert's testimony helped to dispel common misperceptions held by jurors regarding the reporting of child sexual abuse, rebutted an inference that the victim's delay was inconsistent with the behavior of a child sexual abuse victim, and did not improperly bolster the victim's credibility. *Id.* at 379–80. For a case in which an expert witness improperly vouched for the child's credibility, see *People v Garrison (On Remand)*, 187 Mich App 657, 659 (1991) (expert witness testified that child's use of anatomically correct dolls "demonstrated that she had indeed been sexually abused").

In *People v Draper (On Remand)*, 188 Mich App 77 (1991), the Court of Appeals, in light of the Supreme Court's opinion in *Beckley*, *supra*, reversed its previous opinion in *People v Draper*, 150 Mich App 481 (1986), which upheld the admission of expert testimony by two psychologists who gave opinions that the victim had been sexually abused. In *Draper (On Remand)*, the Court of Appeals found that this expert opinion testimony was prohibited under *Beckley* because it went "beyond merely relating whether the victim's behavior is consistent with that found in other child sexual abuse victims. They are opinions on an ultimate issue of fact, which is for the jury's determination alone." *Id*. at 78–79. However, the Court found that the psychologists' testimony concerning the characteristics normally found in sexually abused children was proper because it assisted the trier of fact without rendering an opinion regarding whether abuse had in fact occurred. *Id*. at 78.

In *People v Smith*, 425 Mich 98, 102–04, 112, 114 (1986), the Michigan Supreme Court held as inadmissible to prove that a sexual assault occurred an obstetrician/gynecologist's expert opinion that was based on the victim's emotional state—"agitated," "extremely nervous" and "shaking"—and on the victim's history as she described it. However, the Supreme Court found that the portion of the expert opinion regarding forceful penetration, which was based on the expert's personal observation of a red mark on the victim's face and small abrasions at the entrance of her vagina, was admissible to prove that a sexual assault occurred.

In *In re Rinesmith,* 144 Mich App 475 (1985), a physician reported suspected sexual abuse of a four-year-old girl to the Department of Social Services (now the Family Independence Agency). Social workers presented the girl with anatomically correct dolls;* the girl stated that the male doll "looked like daddy" and threw the doll across the room. The girl also undressed the male doll and put its penis in her mouth two times. *Id.* at 480. A witness qualified as an expert in child abuse testified that anatomically correct dolls were widely used to detect possible sexual abuse. She added

*See Section 11.8(B), above, for discussion of the use of anatomically correct dolls during court proceedings.

that, in her clinical experience, children thought to have been sexually abused became upset, angry, or afraid of the dolls, or that they had the dolls engage in sexual behaviors, whereas children not thought to have been sexually abused expressed initial curiosity then became bored. *Id.* The Court of Appeals held that the use of anatomically correct dolls to elicit responses from children does not rise to the level of a "scientific test"; thus, expert testimony regarding such responses need not meet the standards for reliability imposed on scientific tests. *Id.* at 481. The expert witness in *Rinesmith* was also presented with hypothetical facts mirroring the evidence admitted in the case and concluded that the four-year-old girl in the hypothetical had been sexually abused by her father. The Court of Appeals held that because the expert's conclusion "was based on a general knowledge of the development and sexual awareness of 4-year-olds and was not an evaluation of [the girl's] credibility," the expert did not usurp the jury's function. *Id.* at 482.

11.12 Requirements for the Use of Photographs

This section addresses the admissibility of photographic evidence, which includes digital and analog images. The discussion concerns two issues that commonly arise when such evidence is introduced at trial:

- Authentication (MRE 901).
- Relevancy questions (MRE 401 and 403).

Authentication. Authentication of photographic evidence is governed by MRE 901(a), which states:

> "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

To lay a proper foundation for the admission in evidence of a photograph, a person familiar with the scene or object photographed must testify that the photograph accurately reflects the scene or object photographed. The photographer need not testify. *People v Riley,* 67 Mich App 320, 322 (1976), rev'd on other grounds 406 Mich 1016 (1979).

Relevance. According to MRE 401:

> "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

In general, "[a]ll relevant evidence is admissible." MRE 402. An exception to this general rule is set forth in MRE 403, which provides:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

In *People v Mills*, 450 Mich 61 (1995), modified and remanded on other grounds 450 Mich 1212 (1995), the Michigan Supreme Court applied MRE 401 and MRE 403 in reviewing a trial court's decision to admit 17 color slides of a victim's severe burn wounds in the trial of two defendants charged with assault with intent to commit murder. In determining admissibility under MRE 401, the Supreme Court first considered whether the proffered slides were "material." To be material, a fact need not be an element of a crime, cause of action, or defense, but it must be "in issue," i.e., it must be within the range of litigated matters in controversy. *Mills*, *supra* at 68. The Court noted that all elements of a criminal offense are "in issue" when a defendant pleads not guilty. It further noted that such evidence is not inadmissible merely because it relates to an undisputed issue. *Id*. at 69, 71. The Court addressed whether the proffered slides had "probative force," defined as *any* tendency to make a material fact more or less probable than it would be without the evidence. *Id*. at 68. Applying these principles, the Court concluded that all 17 slides were relevant under MRE 401 because they were probative of facts "of consequence".

Having concluded that the slides were relevant, the Supreme Court considered whether the probative value of the slides was substantially outweighed by the danger of unfair prejudice. In this inquiry, the Court cited its previous opinion in *People v Eddington*, 387 Mich 551 (1972), where it rejected the notion that the prosecution must pursue alternative proofs before resorting to photographic evidence and adopted the following test for admissibility of photographs:

> "'Photographs that are merely calculated to arouse the sympathies or prejudices of the jury are properly excluded, particularly if they are not substantially necessary or instructive to show material facts or conditions. If photographs which disclose the gruesome aspects of an accident or a crime are not pertinent, relevant, competent, or material on any issue in the case and serve the purpose solely of inflaming the minds of the jurors and prejudicing them against the accused, they should not be admitted in evidence. However, if photographs are otherwise admissible for a proper purpose, they are not rendered inadmissible merely because they bring vividly to the jurors the details of a

> gruesome or shocking accident or crime, even though they may tend to arouse the passion or prejudice of the jurors. Generally, also, the fact that a photograph is more effective than an oral description, and to that extent calculated to excite passion and prejudice, does not render it inadmissible in evidence.
>
> "'When a photograph is offered the tendency of which may be to prejudice the jury, its admissibility lies in the sound discretion of the court. It may be admitted if its value as evidence outweighs its possible prejudicial effect, or may be excluded if its prejudicial effect may well outweigh its probative value.'" *Id*. at 562-563, quoting 29 Am Jur 2d, Evidence, § 787, p 860-861.

Applying this standard, the Supreme Court in *Mills* concluded that the relevancy of the slides was not substantially outweighed by the danger of unfair prejudice. The Court found that the slides were accurate factual representations of the victim's injuries. The Court further noted that, in deciding to admit 17 slides into evidence, the trial judge had reviewed 30 out of 150 slides, excluding those that appeared to be repetitive, gruesome, or unfairly prejudicial. *Mills*, *supra* at 77-80.

See also *People v Levy,* 28 Mich App 339, 342 (1970) (photographs of injuries to child's body admissible to support medical testimony that injuries were result of a beating).

In *People v Bulmer*, 256 Mich App 33, 34–36 (2003), the Michigan Court of Appeals upheld the trial court's admission of a computer-animated slideshow simulation regarding shaken baby syndrome. The prosecutor called an expert witness, Dr. DeJong, to testify regarding shaken baby syndrome. As an aid to illustrate Dr. DeJong's testimony, the prosecutor showed a computer-animated slideshow simulation of what happens to the brain during a "shaken baby" episode. The Court of Appeals stated:

> "Demonstrative evidence is admissible when it aids the factfinder in reaching a conclusion on a matter that is material to the case. *People v Castillo*, 230 Mich App 442, 444; 584 NW2d 606 (1998). The demonstrative evidence must be relevant and probative. *Id*. Further, when evidence is offered not to recreate an event, but rather as an aid to illustrate an expert's testimony regarding issues related to the event, there need not be an exact replication of the circumstances of the event. *Lopez v Gen'l Motors Corp*, 224 Mich App 618, 628, n 13; 569 NW2d 861 (1997).
>
> "After reviewing the slideshow, we conclude that it simply demonstrated what Dr. DeJong was describing in

her testimony. Defendant did not object to Dr. DeJong's testimony that described in detail the shaken baby syndrome. The court also clearly advised the jury that the slideshow was a demonstration and not a reenactment of what happened to the victim. The brief slideshow was relevant and probative in refuting defendant's claim that he only "gently" shook the victim. The slideshow was not a reenactment. It illustrated Dr. DeJong's testimony regarding a material issue relating to the case, i.e., whether defendant gently or severely shook the victim. See *Castillo, supra.* Even if we concluded that the admission of the slideshow was a close evidentiary question, a decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000)." *Id.* at 35–36.

11.13 Prohibition Against Calling Lawyer-Guardian Ad Litem as Witness

Neither the court nor another party to the case may call a lawyer-guardian ad litem as a witness to testify regarding matters related to the case. MCL 712A.17d(3).